American Bar Association
www.supremecourtpreview.org

Case No. 07-582

In the Supreme Court

Of the United States of America

Federal Communications Commission

And United States of America, Petitioners

v.

Fox Television Stations, Inc., Et Al., Respondents

On Writ of Certiorari to the United States

Court Of Appeals for the Second Circuit

Amicus Brief and Motion for Leave to File

Of Decency Enforcement Center for Television

Supporting Petitioners

Thomas B. North
Counsel of Record
1387 N. State St., #11
St. Ignace, MI 49781
(906) 643-6348

MOTION FOR LEAVE TO FILE AMICUS BRIEF

Proposed amicus curiae Decency Enforcement Center for Television, by and through its counsel of record, hereby files this Motion requesting leave to file its attached Amicus Brief (with counsel of record listed at the end thereof), and in support of this Motion, states as follows:

1. The nature of Movant's interest is fully set forth in the Interest of the Amicus Curiae section on page 1 of the proposed Amicus Brief, which follows. In the interest of limiting the word count of this document and avoiding duplication, that section of the proposed brief is hereby incorporated by reference herein, as if set forth word for word in this Motion.
2. Movant has received written consent to file the attached brief from the Office of the U.S. Solicitor General, representing both petitioners, Federal Communications Commission, and United States of America. Movant has also received written consent to file the attached brief from all principal respondents in the case, as set forth on this Court's docket of this case, being Fox Television Stations, NBC Universal, and NBC Telemundo, as well as from CBS Broadcasting and intervening respondent Center for Creative Voices, Inc.
3. However, the Petition for Writ of Certiorari lists a few additional parties to this proceeding, which are listed below, and which list is also consistent with the record of the

case from the underlying court, the U.S. Court of Appeals for the Second Circuit.

4. Movant on April 22, 2008, mailed a letter to every party in this case, requesting written consent to file an amicus brief supporting petitioners. All are presumed by law to be received.
5. As of May 26, 2008, the date that this Motion and Brief had to be sent to a printer to publish them in the booklet format required by U.S. Supreme Court Rule 33.1, for filing by the June 9, 2008 deadline, Movant had not received any written response from any of the following respondents or their counsel: NBC Affiliates, Inc.; ABC Television; KTRK Television; WLS Television; ABC Affiliates; FBC Affiliates; or Hearst-Argyle.
6. This Motion is made pursuant to U.S. Supreme Court Rules 21 and 37.
7. Many of the arguments presented in the proposed brief have not been raised by any other party or amicus, and are critical to a full and accurate legal consideration of this case by this Court, especially from the perspective of the legal and practical reality of the potential impact of the Court's decision upon life in this nation for its citizens. That consideration should not be precluded by the withholding of consent from any parties in the case opposite those sought to be supported by the brief, who have themselves consented, along with the principal respondents.

QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communication Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent or profane language", 18 U.S.C. 1464; see 47 C.F.R. 73.3999, when the expletives are not repeated.

PARTIES TO THE PROCEEDING

Petitioners are the Federal Communications Commission and the United States of America.

Respondents who were petitioners in the court of appeals below are Fox Television Stations, Inc.; CBS Broadcasting, Inc.; WLS Television, Inc.; KTRK Television, Inc.; KMBC Hearst-Argyle Television, Inc.; and ABC Television, Inc.

Respondents who were intervenors in the court of appeals below are NBC Universal, Inc.; NBC Telemundo License Co.; NBC Television Affiliates; FBC Television Affiliates Association; CBS Television Affiliates; Center for Creative Community, Inc., doing business as Center for Creative Voices in Media; and ABC Television Affiliates Association.

CORPORATE DISCLOSURE STATEMENT

Decency Enforcement Center for Television, a Michigan non-profit, IRC 501 (c) (3) tax exempt, corporation has no parent company, and no publicly held company owns 10% or more of its stock. (Decency Enforcement Center for Television currently is incorporated on a non-stock basis).

TABLE OF CONTENTS

Page

Interest of the Amicus Curiae 1

Summary of Argument 3

Argument

I.There is no constitutional question presented to the Court in this case, and any attempt to present argument on a constitutional question is precluded by the rules of this Court.....8

II.**In the alternative,** if there is any attempt by any Respondent to argue a constitutional question, and if this Honorable Court were to contemplate considering a constitutional question, the following additional arguments are advanced.....11

A. There is no necessity for this Court to address or decide a constitutional question 11

B. The advent of technologies for broadcast **television** (the "V-chip" and ratings) cannot possibly provide any basis for a finding that indecency restrictions in the "Radio Communications Act" are unconstitutional, especially when

there do not exist any blocking technologies or ratings for broadcast **radio**.....20

C. Broadcast television and radio remain uniquely pervasive and accessible to children. Respondents' arguments to the contrary in the court below and replies to the Petiton for Certiorari, as well as comments of the Court of Appeals panel, evidence that they are based on a complete lack of understanding of "pervasiveness" as a basis of the "*Pacifica*" decision.....22

D. The indecency statute and Commission's rules remain the least restrictive means of achieving the government's compelling interest of helping citizens protect themselves and their children from broadcast indecency in their homes and all public places.....27

E. The V-chip does not come even remotely close to meeting the requirement of "effectiveness" in *Sable* 34

F. The two television shows that are the subject of this case provide perfect examples of the

ineffectiveness of the V-chip in blocking indecency or any other content, and why.....35

III.The Court of Appeals erred in striking down the Commission's determination on the basis that it did not show a reasonable cause for a change of policy as to "fleeting expletives".....37

Conclusion.....39

TABLE OF AUTHORITIES

Cases: Page

FCC v. Pacifica Foundation, 438 U.S. 726 (1978).....5, 17-24, 28, 31-32

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175; 177.....10

Irvine v. California, 347 U.S. 128, 129.....10

Lyng v. N.W. Indian Cemetary Protective Ass'n., 485 U.S. 439, 445 (1988).....15

Mazer v. Stein, 347 U.S. 201, 206 10

Sable v. FCC, 492 U.S. 115 (1989) 6-7, 34-35

United States v. Butler, 297 U.S. 1, 79 (1936).....16

United States v. Playboy Entertainment Co., 529 U.S. 803, 816, 826, 827 (2000).....28, 30-31

Constitution, statutes and regulations:

U.S. Constitution, First Amendment.....17-18

Radio Communications Act of 1934.....2, 5, 20-21

18 U.S.C. 1464.....4-8, 14, 17-21, 25, 37

47 C.F.R. 73.3999..... 8

U.S. Supreme Court rules:

Rule 14 .....3, 8, 10

Rule 24 .....3, 10

Rule 37 2

INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Decency Enforcement Center for Television (hereafter "Decent TV") files this brief supporting petitioners. Decent TV is successor in interest to Thomas B. North, who, while a Probate/Family Judge in Michigan, individually filed an amicus brief in this case in the U.S. Court of Appeals for the Second Circuit, with leave. Thereafter, Decent TV was incorporated for the purpose of legally defending human and civil rights secured by decency laws, especially those for television. Decent TV speaks and advocates from the legal and practical perspective of 1) the over 30 million American citizens who have one or more televisions in their homes, but do not have cable or satellite service, and therefore, do not have any content "blocking technologies" afforded by such services, and 2) those millions of American citizens who do not have a "V-chip", the technology in newer and larger televisions that, if properly programmed, "blocks" broadcast programs out, based on the rating assigned by the broadcaster, if a rating has been assigned.

Decent TV therefore advocates for the tens of millions of Americans who rely solely on the laws and rules of the United States government,

[1] No counsel for any party authored this brief in whole or in part, nor did counsel for any party make any monetary contribution intended to fund the preparation or submission of this brief. U.S. Supreme Court Rule 37.6. Written consent to filing received from Petitioners and principal Respondents Fox and NBC – see Motion for Leave to File.

including the Federal Communications Commission, to protect themselves from indecency in the sanctity of their own homes. Decent TV is further representative of EVERY American citizen in the sense that 1) they must rely on those federal laws to protect themselves and their families from broadcast television indecency in the many everyday public places in which broadcast television is present, but where citizens cannot program a "V-chip", and 2) citizens are constantly within range of one or more broadcast radio stations, for which there is no "V-chip" or other blocking technology in existence, but which are regulated by the same federal statute, the Radio Communication Act (18 U.S.C. sec. 1464) and the rules promulgated thereunder.

American citizens cannot be expected to assume that all necessary legal and factual arguments will be made by the parties to the case or other amici, partly due to the number of issues that may be raised, and word limitations in parties' briefs. Many of this amici's arguments were not raised by any other party or amicus in the Second Circuit. There is a critical right of American citizens to fully protect their own interests by participating in the process of the courts, to ensure that all of their critical, necessary arguments are advanced for consideration. The participation of amicus curiae is recognized in U.S. Supreme Court Rule 37.

SUMMARY OF ARGUMENT

The Court of Appeals did not address the constitutional arguments made by some Respondents (Petitioners in that court) or their amicus concerning Federal Communications Commission (hereafter, the "Commission") change of policy. The Question Presented to this Court by Petitioners is a narrow administrative law question, further narrowed by the facts of the case, two television programs broadcast with unedited, live, spontaneous expletives uttered by third parties before 10 p.m., as opposed to any kind of expletives that might be scripted by one of the Respondent networks. There is NO constitutional question presented to this Court. No cross petition has been filed. Any attempt by any Respondent or amicus to now argue any constitutional question to this court is precluded by this Court's Rules 14 and 24.

In the alternative, since amicus cannot file reply briefs, and this being the only opportunity for amicus to argue, if this Court were to nevertheless contemplate considering any constitutional argument that may be made by any Respondent or its amicus, additional prospective arguments are summarized as follows.

There is no necessity for this Court to consider any constitutional question, for several reasons. First, any argument that the technological advent of the "V-chip" blocking technology for broadcast television, as Congressionally mandated, conflicts with the pre-existing federal statutory indecency restrictions for

that medium, and the rules under that statute, is, at the very most, a legislative issue for Congress to resolve, as the author of both statutes. Such a statutory conflict could not possibly affect the established constitutionality of the indecency statute, or even be an issue for the judiciary. Further, the statutes compliment one another, as intended, and do not conflict.

Second, the fundamental and longstanding principle of judicial restraint precludes any serious consideration of a constitutional issue, when the constitutionality of the federal indecency statute and rules generally have already been established by this Court, and the question presented is a narrow administrative law question on the facts presented.

Next, Respondents have failed to preserve any request for any finding as to the general constitutionality of any federal statute or rule. At most, some Respondents have raised an argument that the Commission's determinations as to the two specific television programs' "fleeting expletives" were a change of policy that may be unconstitutional.

This Court has already permanently established that the existing (and since unchanged) indecency provisions in 18 U.S.C. 1464, and the Commission's rules thereunder are constitutional. The judicially established constitutionality of a federal statute and rules only then changes if there is legislative activity, and is not affected by mere later factual events, such as the advent of technology. Further,

this Honorable Court and its Justices are duty bound by oath, and the fundamental and longstanding principle of "stare decisis" to not deviate from precedent.

The advent of the "V-chip", the only blocking technology pertinent to this case, cannot possibly provide any basis for finding that restrictions contained in 18 U.S.C. 1464, the Radio Communications Act, are unconstitutional. The Act applies primarily to broadcast radio, passed by Congress before the invention of television, and which has apparently since been applied to television by everyone, as a form of radio transmission. However, if this Court were to ever strike down the indecency provisions of that statute based on a network's arguments as to the broadcast television "V-chip", it would necessarily also invalidate the statute in its entirety as to broadcast radio. Yet, there does not exist any "V-chip" or ratings for broadcast radio. The federal statute and rules are the ONLY protections that exist against indecent broadcast radio.

Broadcast television and radio remain as uniquely pervasive and accessible to children as ever, if not more so. The arguments of one or more Respondents and their amicus in the Court of Appeals below, as well as of Respondent NBC in its Reply Brief to the Petition for Certiorari, and comments of the Court of Appeals panel, evidence and are entirely based on a clear lack of any understanding of "pervasiveness" as a basis for this Court's decision in *FCC v Pacifica*

Foundation, 438 U.S.726 (1978).

The federal broadcast indecency statute and rules remain the least restrictive means of achieving the government's compelling interest in protecting children and unconsenting adults in their own homes and in all public places. There is no legal basis to find otherwise. It has been Congress' intent continuously since 1934 that the indecency restrictions in 18 U.S.C. 1464 be enforced as valid, and the judicial branch is legally bound to continue to defer to Congress.

The "V-chip", as a "means", is not available in the televisions of millions of American citizens, leaving them to rely on 18 U.S.C.1464 and its rules as their only means of protection against broadcast indecency. In the United States, laws are written to protect all citizens, especially minorities, and not just the majority, such as the 80% or so who choose to subscribe to cable or satellite television, or who choose to purchase a new, large television with "V-chip" technology.

The "V-chip" does not come even remotely close to meeting the "effectiveness" requirement from *Sable v FCC, 492 U.S. 115 (1989).* Some of the reasons are in foregoing arguments, including the continued unique pervasiveness of the broadcast medium, not present in *Sable.* The only way to program a "V-chip" to block a show is by programming into it the "TV rating" assigned to the program by its network. Many programs are not assigned TV ratings, and cannot be blocked by a "V-chip". The record proves

there is at least a 68% error rate in the rating of programs by Respondents. There is circumstantial evidence that this "mis-rating" is deliberate, to avoid the resulting loss of advertiser revenue, from lower rates commanded by programs that have a TV rating that would exclude the younger audiences. This circumvention of the "V-chip" operation and effectiveness is by the same Respondents that would like the judiciary to discard at least some of the FCC rules under an 80 year old still-effective statute, in favor of this dysfunctional and impractical "V-chip." *Sable* requires that technology to be practical for users to be effective. The "V-chip" is not at all.

The two subject television broadcasts are perfect examples of the ineffectiveness of the "V-chip". Both contained expletives that meet objective criteria for a "TV-MA" adults-only rating. Even if the most diligent parent had a "V-chip" and properly programmed it to block "TV-MA" programs, it could not have possibly functioned to block them, because neither was actually rated "TV-MA."

The Court of Appeals erred by voting 2-1 to strike down the determination of the Federal Communications Commission that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language", 18 U.S.C. 1464, when the expletives are not repeated.

ARGUMENT

I.THERE IS NO CONSTITUTIONAL QUESTION PRESENTED TO THE COURT IN THIS CASE, AND ANY ATTEMPT TO PRESENT ARGUMENT ON A CONSTITUTIONAL QUESTION IS PRECLUDED BY THIS COURT'S RULES.

The U.S. Court of Appeals for the Second Circuit correctly refrained "from deciding the various constitutional challenges to the Remand Order raised by the Networks". The Court of Appeals struck down the determination of the Commission, but on an administrative law challenge.

This Court's Rule 14.1 (a) states that it is the Petitioner, in its Petition, that presents the question to be reviewed by the Court. The Commission established the Question Presented to this Court as follows: "Whether the court of appeals erred in striking down the Federal Communication Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. 1464; see 47 C.F.R. 73.3999, when the expletives are not repeated."

The question is further narrowed by the facts of the case, which are live, spontaneous, unscripted expletives uttered by third parties. This case has nothing to do with expletives scripted into a program

by broadcasters. There is no reason for this case to have any precedential bearing on whether or not scripted expletives continue to be actionable or not.

No Cross-Petition has been filed.

Some Respondent networks filed Reply Briefs in opposition to the Petition for Writ of Certiorari. In particular, the Reply Brief of Respondents NBC Universal and NBC Telemundo, while at page i. presenting the question to be reviewed as an administrative one, and at page 1 stating that this case "involves nothing more than a routine application of administrative law", goes on towards its end to essentially preserve for any remand, a summary of the constitutional arguments it made to the Court of Appeals.

Coupled with a press release reported by Parents Television Council to have been made by Respondent Fox Television upon this Court's grant of certiorari, that Fox is happy to have "the opportunity to argue that the FCC's expanded enforcement of the indecency law is unconstitutional", there is reason to believe that one or more Respondents will attempt to raise a constitutional question in this Court.

Because amicus are not allowed to file reply briefs, any argument of amicus for petitioners can only be presented now, prospectively, without knowing what arguments Respondent networks or their amicus will actually make. Given the interest of this amicus, its arguments are primarily being submitted prospectively in case a constitutional argument is

attempted.

This Court's Rule 14.1 states that, "only the questions set out in the petition, or fairly included therein, will be considered by the Court." Then, this Court's Rule 24.1 (a) provides that briefs "may not raise additional questions or change the substance of the questions already presented" in the petitions or jurisdictional statements.

The Supreme Court "will generally limit its consideration of the case to the questions specifically brought forward by the petition." *General Talking Pictures Corp. v Western Electric Co., 304 U.S. 175;177-178.* This Court's judgment in *Irvine v California, 347 U.S. 128,129* said:

> "We granted certiorari on a petition which tendered four questions. However, petitioner's counsel has now presented two additional questions... Neither of these was mentioned in the petition. We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition unless we limit the grant, as frequently we do to avoid settled, frivolous or state law questions."

And, "the fact that a constitutional question was mentioned in argument does not bring the question properly before the Court." *Mazer v Stein, 347 U.S. 201, 206, n.5.* That the only question presented to

this Court is the administrative law question, and no constitutional question is presented, is verified even by reference to this Court's docket of this case. In addition to Respondent NBC, the Reply Brief of Respondent Fox Television to the Petition for Certiorari also states that the question presented is an administrative one.

It cannot be argued that there is any constitutional question "fairly contained within" the Question Presented in the Petition, because the latter question is, as set forth by Petitioners, "Whether the court of appeals erred...." in its decision. Because the Court of Appeals refrained from deciding any constitutional question, it is not possible that there is any constitutional question "fairly contained within" the question of whether the court of appeals erred in its decision.

II. **IN THE ALTERNATIVE,** IF THERE IS ANY ATTEMPT BY ANY RESPONDENT TO ARGUE A CONSTITUTIONAL QUESTION, AND IF THIS HONORABLE COURT WERE TO CONTEMPLATE CONSIDERING A CONSTITUTIONAL QUESTION, THE FOLLOWING ADDITIONAL ARGUMENTS ARE ADVANCED:

A.THERE IS NO NECESSITY FOR THIS COURT TO ADDRESS OR DECIDE A CONSTITUTIONAL QUESTION.

1. The technological advent of the "V-chip" for broadcast television and the

> Congressional mandate that it be incorporated into some new televisions, compliment, rather than conflict with, the older federal statute and rules containing broadcast indecency restrictions. In the alternative, at the very most, there is a statutory conflict for Congress to resolve, and no judicial or constitutional issue at all.

Since adoption of the broadcast indecency restrictions in federal statutes and rules, there has been a technological advent known as the "V-chip", for broadcast television only. (This case has nothing to do with cable or satellite television, which are not regulated by government in terms of content). Congress enacted legislation that mandates that "V-chip" technology be incorporated into larger televisions sold in the United States in recent years.

The arguments of Respondents in the court below, and Respondent NBC in its Reply Brief to the Petition for Certiorari, include one that there has been a change of policy by the Commission as to "fleeting expletives" that may be unconstitutional, which assertions are entirely based on the advent of the "V-chip" technology, and the "TV ratings" system upon which the "V-chip" operates. Their arguments appear to say that the "V-chip" is an adequate means for parents to block "fleeting expletives", so that any change of Commission policy in that area is unnecessary and unconstitutional.

Congress' intent in enacting "V-chip" legislation was

that it would compliment and supplement the existing indecency statute and rules for broadcast television. Due to outcry from the general public about ever increasing indecency in broadcast television, Congress acted in this way to provide parents and viewers with one MORE tool of protection. In the legislative process, Congress and the then-President clearly and repeatedly stated this intent in public. Contrary to those facts, NBC advanced a claim in the court of appeals that "Congress and the President had concluded that the 'V-chip' would constitute a more effective and less intrusive means of protecting children than direct Commission regulation". (While some of the networks quoted some of the congressional record and president's statements in their court of appeals briefs, close review of those statements and records showed that none of them in fact supported NBC's above claim).

Arguments by Respondent networks to that effect fly in the face of the fact that just in 2006, while this case was in the Second Circuit, Congress overwhelmingly passed legislation increasing about ten-fold the fines for violation of the broadcast indecency laws and rules. Congress has consistently intended that the indecency laws be enforced as valid, and that they were not abrogated by the "V-chip".

It was the intent of not just Congress and the President that the "V-chip" supplement, rather than supplant, the indecency laws - it was the intent of all

Respondent networks as well. At least, that is what Respondent networks reported to the public through their respective news bureaus. Further, the press reported the networks had agreed with Congress that, in exchange for "V-chip" legislation, and a promise by some Congressional leaders of a three year moratorium on any further legislation in the area of broadcast content (which has long since passed), they would never under any circumstances use the "V-chip" or TV ratings to do exactly what they just did in the court of appeals in this case, i.e., argue that the "V-chip" or TV ratings should take the place of any indecency laws or rules. The Parents Television Council adamantly warned that the networks would renege on those promises, and PTC proved to be prophetic. This Court should hold Respondents to their public promises.

In the alternative, even if this Court were to find a conflict of some type between the older indecency statute or rules promulgated under it, and the newer "V-chip" statute, the impact of the latter is, at very most, a legislative issue for Congress to resolve. Respondents can more easily request a Congressional representative to initiate some legislative procedure to resolve any conflict, than to request relief from the courts on a legislative matter.

There is no such issue at all for the judicial branch of government, and certainly not any kind of constitutional crisis that needs to be addressed by the Supreme Court. The indecency provisions of 18 U.S.C. 1464 have already been permanently

established by this Court to be constitutional, as will be argued later. Congress' later adoption of the minor "V-chip" legislation does not create any constitutional issue for the courts to resolve. Any conflict can easily be the subject of some legislative amendment. In fact, if any governmental body (legislative or judicial) were to determine that one or more rules or laws in this field have to be repealed or stricken, the most logical and sensible result would be for Congress to repeal the "V-chip" legislation, given its history of complete failure, which will be argued later.

2. The fundamental and longstanding principle of judicial restraint precludes any serious consideration of any constitutional issues in this case by this Court.

As the Court of Appeals correctly stated, "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v N.W. Indian Cemetary Protective Ass'n., 485 U.S. 439, 445 (1988).* If this Court affirms the Second Circuit, the net effect will be that, because the Second Circuit did not reach any constitutional issues, the law in this area will remain the same as before, except that the Commission will have to accept the remand order of the Second Circuit, and hold proceedings (if it desires to) concerning live, unscripted, fleeting expletives before possibility of further action against

them. It must also be noted that this case has no relevance to other potential types of broadcast indecency apart from expletives, i.e., any form of nudity or other sexual content.

If, however, this Court were to reverse the Second Circuit in this case, the principle of judicial restraint would still compel against considering any constitutional challenges, primarily due to later arguments to be made regarding this Court having already permanently established the constitutionality of the indecency statute and rules. The principle of judicial restraint, then, requires self-restraint by the individual Justices of the Court, since there is very little in the way of checks and balances to enforce the principle established by the decisions. ("...the only check upon our own exercise of power is in our own sense of self-restraint." *United States v Butler, 297 U.S. 1, 79 (1936)(Justice Stone's dissenting opinion).* In this case, the principle of "judicial restraint" is an infinitely more powerful reason to refrain from considering or addressing the already permanently established constitutionality of a federal statute of over 70 years and the rules under it, than is the mere factual technological advent of the ineffective "V-chip" any reason for this Court to instead consider any aspect of it.

3. Respondent networks have failed to preserve any request for any finding as to the general constitutionality of any statute or administrative rules, by failing to raise it in the court of appeals.

In this case, no Respondent has ever requested any finding of the court of appeals or this Court as to the general constitutionality of any statute or rule. Their amicus lack legal standing or authority to independently make any such request beyond the requests made by Respondents themselves. The only request that has been raised and preserved by a party at any time on a constitutional basis is the challenge specifically to any change of Commission policy as to "fleeting expletives." If any network attempts to argue for any finding that anything prior to the Remand Order is unconstitutional, it has not been previously raised or preserved, and is out of order.

4. The constitutionality of the indecency restrictions in 18 U.S.C. 1464, permanently established by this Court in *Pacifica,* is not affected by a mere subsequent factual event, such as the technological advent of the "V-chip", and this Honorable Court is duty bound by oath and "stare decisis" to apply the precedent of its decision in *Pacifica.*

The First Amendment of the U.S. Constitution of course provides the "Congress shall make no law...impairing the right to free speech". And, of course, there is a long litany of federal court decisions, that are not in issue, in which this Court and lower courts have found that a limited right of government to place reasonable regulations upon

speech is consistent with the First Amendment. To the extent that 18 U.S.C. 1464 and the Commission's rules have been found constitutional by this Court and every lower court that has addressed them, this established constitutionality does not change unless there is some change at the legislative level. The U.S. Constitution does not change, unless it is in accordance with its own provisions for amendment, which require legislative action. The judicial branch has no power to amend it, only to interpret it. The statute itself has not been amended by Congress since 1934. The Commission's rules may have changed at some point, but not at any time germain to this case, except possibly in the subject Remand Order as to "fleeting expletives."

No mere later factual event, such as the technological advent of the "V-chip" in this case, changes the Constitution, or by the same token, the established constitutionality of a statute or rule. In the United States, in our form of government, we apply the law to the facts to reach a legal result; we do not apply the facts to change the law. To now do the latter would turn American jurisprudence completely upside down, in contravention of the Constitution, which is the ultimate legal authority. The law is not a servant to the facts.

This case does not provide an opportunity for anyone to do anything outside of a strict application of this Court's decision in *FCC v Pacifica Foundation, 438 U.S. 726 (1978).* This Court is bound by its oaths, and the fundamental and longstanding principle of

"stare decisis" to uphold and apply the law, including the still effective *Pacifica* precedent. There is no legal authority or any other reason to deviate from *Pacifica.*

In the alternative, if this Court were to deviate from *Pacifica* in any way, all of the laws and facts as to the whole issue of broadcast indecency compel the following. The Court should continue to find 18 U.S.C. 1464 constitutional, as it did in *Pacifica*, but find that the "time channeling" (also known as "safe harbor") aspects of its decision, allowing indecent broadcasts at night, were wrongly decided as contrary to 18 U.S.C. 1464. The current Commission rules permitting indecent, non-obscene broadcasts after 10 p.m. resulted from the *Pacifica* decision. But this Court, from a reading of its opinion in *Pacifica,* did not decide or come up with "time channeling" on its own – it was argued by the Commission. The Court was proper in not going beyond the relief requested by the Commission in that case, as the entity "prosecuting" the case as petitioner. But the Commission had no legal authority to advance the "time channeling" concept in the first place, and in doing so, illegally deviated from its Congressional mandate to enforce and uphold 18 U.S.C. 1464 as written. The statute does not in any way hint at "time channeling", and prohibits indecent broadcasts at any time. Therefore, the whole history of "time channeling" of indecent broadcasts is a chain of illegal events. If anything, this Court should only deviate from *Pacifica* to recognize and remedy this "parade of horribles" that has caused an irreparable

and almost incomprehensible downslide and deterioration of American society and culture emanating from indecent broadcasting. The Court can do the thing that is legal and right in every way by finding that 18 U.S.C. 1464 is constitutional on a 24/7 basis, unless it chooses to take the more restrained approach of strictly following *Pacifica* for now.

B. THE ADVENT OF TECHNOLOGIES FOR BROADCAST **TELEVISION** (THE "V-CHIP" AND RATINGS) CANNOT POSSIBLY PROVIDE ANY BASIS FOR A FINDING THAT INDECENCY RESTRICTIONS IN THE "RADIO COMMUNICATIONS ACT" ARE UNCONSTITUTIONAL, ESPECIALLY WHEN THERE DO NOT EXIST ANY BLOCKING TECHNOLOGY OR RATINGS FOR **RADIO**.

The statute involved, 18 U.S.C. 1464, is part of the "Radio Communications Act of 1934". It has apparently been interpreted to apply to broadcast television, as a form of radio transmission, by everyone, since the subsequent invention and usage of television. However, the statute is primarily addressed to radio, certainly including standard broadcast radio stations. There is no claim that there exists for broadcast radio any "V-chip", similar or other blocking technology, or ratings system. Therefore, the advent of those technologies for **broadcast television** cannot possibly be a basis for

this Court to find unconstitutional the "Radio Communications Act of 1934", any rules or regulations promulgated under it by the Commission that also apply to broadcast radio, or even any change of policy as to "fleeting expletives" if that policy also applies to radio. This argument alone is enough to invalidate any constitutional challenges by Respondents or their amicus, except for one to change of policy by the Commission that expressly only pertains to broadcast television, and not radio.

Pacifica, supra, was a radio case, not a television case, so the argument of Respondent NBC in the lower court that "the underpinnings of *Pacifica* have been undermined" (by the television "V-chip" or ratings) is preposterous. NBC has never explained how a "V-chip" or ratings for television undermine the underpinnings of a U.S. Supreme Court case about radio, which has no broadcast blocking technology or ratings.

If this Court were to find 18 U.S.C. 1464 (or any rules under it that apply to radio) unconstitutional, the net result would necessarily and unavoidably be that the entire citizenry of the United States would be left without laws, rules, blocking technology, ratings, or anything else for protection against any level of indecent radio broadcasts at any time of day - a completely chaotic, "anything goes" "free for all", without any level of accountability or responsibility from or to anyone.

C. BROADCAST TELEVISION AND RADIO REMAIN UNIQUELY PERVASIVE AND ACCESSIBLE TO CHILDREN. RESPONDENTS' ARGUMENTS TO THE CONTRARY IN THE COURT BELOW AND REPLIES TO THE PETITION FOR CERTIORARI, AS WELL AS COMMENTS OF THE COURT OF APPEALS PANEL, EVIDENCE THAT THEY ARE BASED ON A COMPLETE LACK UNDERSTANDING OF "PERVASIVENESS" AS A BASIS OF THE "*PACIFICA*" DECISION.

This Court determined in *FCC v Pacifica Foundation, 438 U.S. 726 (1978)* that it is the law of the United States that broadcast radio has unique pervasiveness and accessibility to children. No one has claimed that broadcast television is any different than radio in terms of pervasiveness or accessibility, although that may have been true through about the 1950's as television usage increased. Those findings of this Court are the last word, and are permanent.

Respondent networks in the court of appeals made numerous arguments that broadcasting is less pervasive now than in 1978 when *Pacifica* was decided. NBC in its Reply Brief to the Petition says that *Pacifica* "rests on a moth-eaten foundation". NBC then immediately went into a discussion of cable and satellite television, the Internet, and other sources of media like cell phones, to try to illustrate

their point.

The Court of Appeals, while properly refraining from addressing the constitutional challenge, apparently could not refrain from the temptation to editorialize, and then proceeded to nevertheless comment on that challenge, unfavorably to the Commission. In doing so, the Court of Appeals' majority comprised of two New York judges somewhat seemed to buy into the above arguments.

What the foregoing arguments of Respondents and comments of the two Court of Appeals judges have in common is that they all evidence that they are based on a complete lack of any understanding of the "pervasiveness" leg of the *Pacifica* decision. They all read the "pervasiveness" language in *Pacifica* to mean that in 1978, broadcast radio (and broadcast television) were the only ways that people could access indecency, at least electronically. They treat "pervasiveness" as the level of exclusivity of one medium in comparison to other mediums. Therefore, they argue on the assumption that, as other television mediums develop, i.e., cable and satellite, and as all other mediums develop- whether they be the Internet, new types of telephones, or anything else that might compete for a radio listener or television viewer's time - broadcast television and radio become less pervasive in comparison.

But, alas, that is not what "pervasiveness" means at all, and it is certainly not how this Court was using

the term as a basis for its decision in *Pacifica, supra.* This is clear from a mere reading of the opinion.

"Pervasiveness" in general when applied to a media issue, and when used by this Court in *Pacifica, supra,* instead has everything to do with the **nature of** the individual medium, standing alone and without regard to any other medium or source. Regardless of the development of cable and satellite television and radio, the Internet, or anything else, broadcast television and radio are still THE television and radio sources that go out into not only EVERY home in America (regardless of whether there is a television or radio present there at a given moment to receive it), but also into EVERY other place in America – every building and every outdoor place, too. Within every building, it also goes into EVERY room. That fact has not changed since 1978 or since the advent of broadcast television, and never will. This is also without regard to whether any other medium is present in that same place. Cable and satellite television and radio, the Internet, and other sources of media, to the contrary, only go where they are invited, usually by subscription. Broadcasting is also unique in that it is free (there is no paid subscription) and requires nothing to install it. A portable battery powered television, for example, receives broadcasts anywhere within range of a station. Respondents ignore all of this. The Commission's Remand Order succinctly states a reasoned basis for treating broadcast television different than "all other speakers."

Respondents would like to make the law ignore the differences between broadcasting and other mediums, like cable/satellite, so that they could use indecency to try to compete with those other completely different industries, and anything else that detracts viewers/listeners, i.e., movie theaters, stage plays, etc. But those mediums are completely different. They do not go into every home and place like broadcasting. NBC, for example, owns a number of cable television networks, and that is the only correct forum for them to use to compete with other cable networks, in the same industry, NOT through their broadcast network. NBC, and to some degree other Respondents in this case, are trying to make indecency pervasive in the homes of ALL Americans - forcing it not just upon those who have chosen it, but also upon all who have not chosen it. This includes the over 30 million Americans from the case record who do not have cable or satellite television, and the over 90 million Americans who only have basic cable. In its Reply Brief to the Petition, on page 31, NBC sets forth an unbelievable number of absurd, quantum leaps in just one paragraph. The statements in that paragraph are ludicrous, obviously intended to, in combination, lead to NBC's perception of "nirvana", a nation devoid of any government regulation of its taxpayer owned public airwaves, so that NBC and other broadcasters can achieve their agenda of broadcasting virtually any level of hard or soft core pornography and indecency at any time into every home and place without any restraint. (The obscenity provisions of 18 U.S.C. 1464, which are not challenged, have been rendered

worthless previously by a series of court cases, the net effect of which is that it applies to virtually nothing, given that even "XXX" rated movies like "Deep Throat" have been adjudicated by courts as not obscene).

NBC states that, "Thus, there no longer exists any sound basis for according broadcast speech less than obtains in other channels of communications." To the contrary, the basis remains the same, for all of the foregoing reasons. NBC also conveniently ignores the fact that they are using the public airwaves, which is not true for non-broadcast communications.

NBC has been the most aggressive Respondent party (and petitioner in the court of appeals) in arguing for the Commission's policy on fleeting expletives to be stricken, relying on the "V-chip" and ratings, but it is at the same time the network that has been the biggest obstacle to those systems, by having refused to ever fully participate in the TV ratings system by using "content descriptors." In fact, Respondent NBC's legal arguments have often sounded more like tantrums, i.e.,"But I don't WANT to play by any rules." There has also been a consistent tone among most of the Respondents' that the Commission is the some kind of "bad guy" on this issue, when in fact, the Commission has been the ONLY principal party in this case that has been complying with the laws and rules adopted by Congress and the federal courts as to the indecency issue, consistent with the First Amendment. Not to mention, the Commission is the only party who pays any attention to the

general public's legal complaints.

Respondent networks seek to not possibly have to answer to anyone, government or viewers, for their currently illegal acts, such as broadcasting indecent expletives before the 10 p.m. safe harbor in this case, and their irresponsible circumvention of the "V-chip" legislation they now rely on, by deliberately mis-rating television programs almost 70% of the time.

In this case involving live broadcasts, Respondent networks rely on the "V-chip" in their arguments, which is proven to not work, while at the same time refusing to be responsible for consistently implementing for live broadcasts a technology that is much more effective, the five second delay. All of the Respondents' arguments are fraught with a "one way street" mentality that leads a reasonable person to believe that they really do not want anything to be implemented, put in place, or to be effective, that might in any way restrict, block or sanction any of their broadcasts, no matter what the content, and thereby interfere with any of their agendas, whether based on forcing unwanted indecency upon people, financial profits, etc.

D. THE INDECENCY STATUTE AND COMMISSION'S RULES REMAIN THE LEAST RESTRICTIVE MEANS OF ACHIEVING THE GOVERNMENT'S COMPELLING INTEREST OF HELPING CITIZENS PROTECT THEMSELVES AND THEIR CHILDREN FROM BROADCAST INDECENCY IN THEIR HOMES AND

ALL PUBLIC PLACES.

1. There is no legal basis upon which to find that the indecency laws and regulations are no longer the least restrictive means.

FCC v Pacifica Foundation, 438 U.S. 726 (1978) and the cases on the issue in the lower federal courts have established that a "least restrictive means" analysis applies in broadcast media cases. Some Respondent networks allude to an argument that the analysis should be changed to a "strict scrutiny" analysis. But they have cited no legal authority for the proposition that once the courts have established the analysis to be used for a particular form of speech, the analysis is anything less than permanent and can be changed, even by this Court, much less that the same should occur not based on any legal reason, but due only to some fact, such as a mere technological advent.

Respondent NBC, in its Reply Brief to the Petition, has also made a statement that, "Indeed, in light of post-*Pacifica* technologies – such as ratings systems and the V-chip – that are capable of withholding indecent material "from the young without restricting the expression at its source", 438 U.S. at 748-49, parents have the ultimate authority over whether programming is "accessible" to children at all." citing *United States v. Playboy Entertainment Co., 529 U.S. 803, 816, 826-27 (2000).* This is one of

the quantum leaps that defies logic. It is the law that parents, broadcasters, and the government each have a role in this nation in assisting one another in protecting children from indecency. In recent years, however, the networks have actively tried to shirk any role or responsibility on their part, and have further fought the government's role tooth and nail, trying to leave parents out there alone. As any of the even most diligent and responsible parents can tell you, it is impossible for them to singlehandedly protect their children without the help of the U.S. government. Any number of scenarios bear this out – single parents, working parents, neglectful parents (whose children have as much right to be protected by government as the children of diligent parents), any parent who allows their child to leave their home to go anywhere (like a friend's home) before they become an adult, etc. It bears reminding that in the U.S., every single person under 18 years of age is a child, by unanimous legal definition. Parents have very little control over the accessibility of their children to broadcasting, especially outside the home, and especially as their children get more mobile.

Ratings and V-chips do not "withhold indecent material". There is no TV rating for all "indecent material", or any V-chip that can be programmed to block all indecency. Again, the ratings and V-chip are based only on the ratings criteria, usually erroneously assigned by the networks (a fact they have never even bothered to publicly challenge in response to all of the many studies proving at least a

68% error rate, until very, very belatedly doing so years later in the court of appeals in this case).

Some Respondents cited *Playboy, supra* in the lower court for the proposition that the least restrictive means does not have to be 100% perfect. That is a misapplication of the principles of that case, which further is completely distinguishable from this case. In *Playboy*, there were faulty cable TV blocking mechanisms that allowed some video and/or audio "signal bleed" of Playboy Channel in a small percentage of homes of cable subscribers that had not subscribed to the Playboy Channel. First, that was a cable television case, so pertinent to this analysis is the fact that only homes as to which the occupants had subscribed to cable had any chance of that problem to begin with. So there was an initial buffer that is not present with broadcast television. But also, there is a big difference between a small percentage of homes with a partial signal bleed that is correctable with a free call to the cable company (from the court record of that case), and a 68% established error rate, found by the Commission in this case, in the ratings upon which the broadcast V-chip entirely depends, which results in a fully clear signal of unblocked indecency, and as to which Respondents do not send to the home a technician to correct it.

In *Playboy, supra*, the court found that blocking technology was only a basis for finding a "less restrictive means" that rendered the law unconstitutional expressly because, by statute, THE

TECHNOLOGY HAD TO BE INSTALLED FREE OF CHARGE TO THE SUBSCRIBER WITHIN TWENTY FOUR HOURS AFTER A FREE TELEPHONE CALL TO THE PROVIDER. So, to really apply *Playboy* to this case, the V-chip could only possibly legally be a "least restrictive means" if the Respondent networks actually installed, free of charge, a "V-chip" set top box within twenty four hours after a free telephone call to that network from any citizen requesting one, anywhere. Even then, the technology itself is not as effective as that in *Playboy.*

Television viewers do not have any burden or responsibility to provide for themselves the cost of the technology i.e., the V-chip, to AVOID indecency. To say otherwise would not only be contrary to the court decisions above, but also perverted and backwards. In the United States, in public places and private homes, decency is the norm, with adult persons free to seek indecency out in private if they choose. Decency can never be allowed to become the exception, rather than the norm.

> 2. This Court's finding in *Pacifica, supra,* as to the unique pervasiveness of the broadcast airwaves was based on not only its accessibility in the home, but also in all public places, where viewers cannot program a "V-chip."

As sacred as homes are, as found by this Court in *Pacifica, supra,* the public airwaves go into many other places, like schools (for all school ages), day

care centers, nursing homes, restaurants, lodging places of all kinds, stores (including department and electronics stores where banks of televisions are on for all shoppers to see), etc. Respondent networks have failed to say how all people that come and go from those types of places are to use a "V-chip" to protect their children and themselves from indecency via broadcasts. It cannot be sanely argued that any private citizen or their child has to be subjected to even a slight risk of so much as brief glimpsing or encountering indecency in the general public just by daring to leave their home and go about their daily affairs. (This is as opposed to other indoor places like movie theaters that may be open to the general public to enter to expressly view indecency). Nor, with all due respect, does any government entity, including the judiciary, have any authority to decide for private citizens that they must take that risk. In fact, this Court has not done that, but has done the exact contrary, by establishing as law that citizens are NOT subject to absorbing a "first blow" of indecency before they can turn away. *Pacifica, supra.* The public airwaves, by settled law, belong to the citizens, not the broadcasters, and are NO different than a public street, sidewalk, park, etc. The broadcast media are therefore different than all other forms, which are by private wire or satellite signal, i.e., cable, satellite, Internet, etc.

3. The "V-chip" is a means that is not available in the homes of millions of American citizens.

Many televisions pre-date the "V-chip", yet work fine for their intended purpose, and will still work after February, 2009, with a digital converter (which, by the way, does not contain a "V-chip"). There will be older televisions in use for decades to come. The Court needs to look at this case from the perspective of the individual families that do not have the blocking technology, no matter what a minor percentage of the population they may become. In this nation, we write laws to protect minorities. Many Americans deliberately do not have cable or satellite television for the express purpose of minimizing the television indecency that may permeate their homes.

The "V-chip" legislation that the networks rely on expressly does not apply at all to televisions with a screen smaller than 13 inches. In the lower court, Respondents quoted statistics of the number of televisions sold since the "V-chip" legislation went into effect, but not the number of those that have smaller screens, and therefore no "V-chip". And, it is reasonable for the courts to take judicial notice that, generally, most smaller televisions end up in childrens' bedrooms, where the "V-chip" would be most needed, if it actually worked.

Respondents also have made much of a statistic that over 80% of American homes have cable or satellite television. But there is no evidence that all cable or satellite systems, especially the older analog systems among them, have blocking technology. And, most satellite television users are either unable or choose

not to receive Respondent broadcast networks via satellite, either because they are not available based on geography, or there is an extra fee. So, those satellite television customers among the 80% still receive any broadcast networks over a regular antenna, and that number is not in the record. Their only blocking technology would still be the "V-chip", if they have it.

E. THE V-CHIP DOES NOT COME EVEN REMOTELY CLOSE TO MEETING THE REQUIREMENT OF "EFFECTIVENESS" IN *SABLE.*

Respondent networks have cited *Sable v FCC, 492 U.S. 115 (1989)* to try to support some of their arguments about blocking technologies. That case required that a blocking technology be "effective" in order to be a means of achieving a compelling government interest. The "V-chip", and ratings on which it relies, do not come anywhere even remotely close to being effective, and *Sable* therefore has NO application to this case. That is partly because of some of the foregoing arguments, including that some programs are not rated, and the rest are mis-rated at least 68% of the time, in order to achieve the great financial incentive of not losing ad revenue by rating for a smaller audience. A .320 batting average is great for a baseball player, but pathetic for the rating of programs, especially when there are clear, objective criteria. Further, when programs are mis-rated, it is almost always in the direction of being rated as suitable for younger viewers than the clear,

written objective criteria dictate, sometimes off by TWO ratings (i.e., TV-MA programs being rated TV-PG). Also, only a very small percentage of V-chips sold are ever actually used, according to the record.

The "V-chip" not only is ineffective, it does not significantly work at all, and is an abject failure. There is no oversight or accountability system as to accuracy of the ratings. The Respondents seek to be the SOLE arbiters of what citizens are subjected to seeing and hearing without any escape. Indeed, it is the broadcast indecency statute and Commission's rules THAT ARE PROTECTING PEOPLE FROM RESPONDENT NETWORKS. Not only are the networks seeking to be the proverbial "foxes guarding the henhouse", but they also do not want to have to answer to anyone later (e.g., the Commission), when they slaughter all the hens.

Respondent networks have not cited any study showing less than a 68% error rate in their ratings assignment. It is not enough to meet *Sable* for anyone to just throw up their hands and say, "Oh well, we tried to help parents. There is some technology out there." Where is the evidence to support the claim of real "effectiveness" akin to *Sable, supra*? The Commission, on remand in this case in 2006, had a 60 day public comment period during which Respondents could have made a record, if they had evidence to do it.

F. THE TWO TELEVISION SHOWS THAT ARE THE SUBJECT OF

THIS CASE PROVIDE A PERFECT EXAMPLE OF THE INEFFECTIVENESS OF THE V-CHIP IN BLOCKING INDECENCY OR ANY CONTENT, AND WHY.

The subject two television programs, even if found not to be legally indecent, provide a perfect example of the ineffectiveness of the "V-chip" and ratings, and WHY the "V-chip" is ineffective.

Respondents would have what they call the current "indecency regime", at least what they argue is a new Commission policy on "fleeting expletives", found unconstitutional. They would replace it with a new regime, the V-chip/ratings, which is exclusively within their control, with no accountability or oversight by anyone.

The Commission, in the Remand Order, has done an excellent job of pointing out that, even if the most diligent parent did everything that Respondents have suggested a parent can do to "ultimately control" what their child sees, the "V-chip" could still not possibly have worked to block either of the two subject programs. Both were rated by the network as TV-PG. Yet, both contained expletives that are rated TV-MA by the objective criteria. A parent who programmed a "V-chip" to block all TV-MA expletives could not have possibly have been successful in doing so, because of the actual TV-PG rating circumventing the "V-chip."

The networks probably did not know that third

parties would utter such TV-MA expletives when they rated the two programs TV-PG. It does not matter. The point is that the two programs illustrate why the V-chip is ineffective.

III. THE COURT OF APPEALS ERRED IN STRIKING DOWN THE COMMISSION'S DETERMINATION ON THE BASIS THAT IT DID NOT SHOW A REASONABLE CAUSE FOR A CHANGE OF POLICY AS TO "FLEETING EXPLETIVES."

As stated earlier in this brief, the primary and express purpose of this amicus is to advocate for the constitutionality of 18 U.S.C. 1464, and the Commission's rules. Any in depth argument as to the administrative law, including those relied upon by the Court of Appeals, is beyond the role of this amicus, and is left principally to the parties and some of the other amicus to develop for the court.

However, it is observed that 18 U.S.C. 1464 does not make any exception from its prohibition on indecent broadcasts for "fleeting", non-repetitive, or live utterances, nor has any such prohibition ever been found unconstitutional by a court. Therefore, there should have always been deference to Congress by the courts and Commission to include those within the statutory prohibitions. That the Commission, when it was comprised differently than now, did not defer to Congress, and gave a pass to broadcasters for "fleeting expletives", was an illegal error, that needed correction to comport with law. Taking an

erroneous position does not forever bind an agency to that policy. Correction of error must be preferable to perpetuating it.

The Commission's legal duty and mandate to have in place rules and policies consistent with the statutes adopted by Congress is, at any time, in and of itself, sufficient and more than reasonable cause to amend those rules and policies to comport with the law, without having to establish more of a record. This amicus supports the arguments of Petitioners that the Court of Appeals erred.

CONCLUSION

Wherefore, the judgment of the U.S. Court of Appeals for the Second Circuit should be reversed, and judgment directed in favor of Petitioners, affirming its determination.

Respectfully submitted,

Thomas B. North

Counsel for

Decency Enforcement Center for Television

May 26, 2008